

In the

# United States Court of Appeals

For the Ninth Circuit

No. 12,628

SUNBEAM FURNITURE CORP., a corporation,

ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, individuals doing business as SUNBEAM FURNITURE SALES CO.,

*Appellants,*  
*vs.*

SUNBEAM CORPORATION, a corporation,  
*Appellee.*

Appeal from the United States District Court, Southern District of California, Central Division.

Honorable  
Leon R. Yankwich,  
Judge Presiding.

## BRIEF FOR PLAINTIFF-APPELLEE.

ROGERS AND WOODSON,  
WILLIAM T. WOODSON,  
BEVERLY W. PATTISHALL,  
LEWIS S. GARNER,  
122 South Michigan Ave.,  
Chicago 3, Illinois,  
*Attorneys for Plaintiff-Appellee.*

JOHN F. McCANNA,  
5600 W. Roosevelt Rd.,  
Chicago, Illinois,

LYON AND LYON,  
REGINALD E. CAUGHEY,  
811 W. Seventh St.,  
Los Angeles, California,  
*Of Counsel.*



## INDEX.

---

	PAGE
Jurisdiction .....	1
Statement of the Case.....	2
A. The Facts.....	2
B. The Issues.....	3
Summary of Argument.....	4
Argument .....	5
I. Plaintiff Proved the Necessary Elements of Infringement and Unfair Competition.....	5
(a) Plaintiff's Proof.....	6
(b) Defendants' Proof.....	9
II. Plaintiff's Trade-Mark Sunbeam Is Infringed..	10
(a) The Statute.....	10
(b) The Common Law.....	13
III. Middle-Men or Distributors Are Liable in an Action for Trade-Mark Infringement.....	16
IV. The Arguments of Defendants' Brief Are Unavailing .....	21
(a) Distinction Between This Action and Sunbeam Lighting Co. et al. v. Sunbeam Corporation, 183 F. (2d) 969 (C. A. 9, 1950).....	21
(b) Other Irrelevant Claims and Arguments .....	22
(c) Plaintiff's Public Reaction Test Evidence Is Admissible and Reliable....	25
Conclusion .....	26

## TABLE OF CASES.

Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. (2d) 685, 689, 104 P. (2d) 650, 652 (1940)	1
American Philatelic Society v. Claibourne, 3 Cal. (2d) 689, 697, 46 P. (2d) 135.....	18
Brooks Bros. v. Brooks Clothing of California, Limited, 60 F. Supp. 442, 459, 460. (Adopted and affirmed, 158 F. (2d) 798 (C. C. A. 9, 1947)).....	12, 15
Chesebrough Mfg. Co. v. Old Gold Chemical Co., 70 F. (2d) 383 (C. C. A. 6, 1934).....	20
Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F. (2d) 280, 283 (C. C. A. 1, 1947).....	11
Del Monte Special Food Company v. California Packing Corporation, 34 F. (2d) 774, 775.....	14
Derringer v. A. J. Plate, 29 Cal. 292 (1865).....	14
The Albert Dickinson Company v. Mellos Peanut Company of Illinois, Inc. (C. A. 7, 1950) 179 F. (2d) 265, 269.....	11
Eastern Columbia, Inc. v. Waldman, 30 Cal. (2d) 268, 181 P. (2d) 865, 867 (1947).....	14, 15
Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483, 494 (1922).....	19
F. W. Fitch Co. v. Camille, Inc., 106 F. (2d) 635 (C. C. A. 8, 1939).....	20
Frischer & Co., Inc. et al. v. Bakelite Corporation, et al., 39 F. (2d) 247 (C. C. P. A., 1930).....	20
Grocers Banking Co. v. Sigler, 132 F. (2d) 498 (C. C. A. 6, 1942).....	20
Hoover Co. v. Groger et al., 12 Cal. App. (2d) 417, 55 P. (2d) 529.....	14
Horlick's Malted Milk Corporation v. Horluck's, Inc., 59 F. (2d) 13, 15 (C. C. A. 9, 1932).....	15

S. C. Johnson & Son v. Johnson, 28 F. Supp. 744, 749 affirmed on appeal (C. C. A. 2, 1940) 116 F. (2d) 427, 429.....	25
Lane Bryant, Inc. v. Maternity Lane Limited of California, 173 F. (2d) 559 (C. A. 9, 1949).....	15
LaTouraine Coffee Co., Inc. v. Lorraine Coffee Company, Inc., et al., 157 F. (2d) 115, 118 (C. A. 2, 1946)	13
Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 F. 657, 661 (1902).....	19
My-T Fine Corporation v. Samuels, 69 F. (2d) 76, 77 (C. C. A. 2, 1934).....	21
Oneida, Ltd. v. National Silver Co. (Sp. Ct., 1940), 25 N. Y. S. (2d) 271, 286.....	25
Radio Shack Corporation v. Radio Shack, Inc., 180 F. (2d) 200, 206 (C. A. 7, 1950).....	23
Safeway Stores, Inc. v. Dunnell, 172 F. (2d) 649, 656 (C. A. 9, 1949).....	12
Saratoga Vichy Spring Co. v. Saratoga Carlsbad Corporation et al., 45 F. Supp. 260, 261 (D. C. S. D. N. Y. 1942).....	20
Saxlehner v. Siegel-Cooper Company, 179 U. S. 42 (1900) .....	20
Standard Brands, Inc. v. Smidler, 151 F. (2d) 34, 37 (C. C. A. 2, 1945).....	23
Stork Restaurant v. Sahati, 166 F. (2d) 348 (C. A. 9, 1948) .....	15
Sunbeam Lighting Co. et al. v. Sunbeam Corporation, 183 F. (2d) 969 (C. A. 9, 1950).....	4, 21
Tillman & Bendel v. California Packing Corp. (C. C. A. 9, 1933) 63 F. (2d) 498, 502.....	25
Triangle Publications, Inc. v. Rohrllich et al., 167 F. (2d) 969, 972 (C. C. A. 2, 1948).....	24

## TABLE OF CASES.

Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. (2d) 685, 689, 104 P. (2d) 650, 652 (1940)	14
American Philatelic Society v. Claibourne, 3 Cal. (2d) 689, 697, 46 P. (2d) 135.....	18
Brooks Bros. v. Brooks Clothing of California, Limited, 60 F. Supp. 442, 459, 460. (Adopted and affirmed, 158 F. (2d) 798 (C. C. A. 9, 1947)).....	12, 15
Chesebrough Mfg. Co. v. Old Gold Chemical Co., 70 F. (2d) 383 (C. C. A. 6, 1934).....	20
Coca-Cola Co. v. Snow Crest Beverages, Inc., 162 F. (2d) 280, 283 (C. C. A. 1, 1947).....	11
Del Monte Special Food Company v. California Packing Corporation, 34 F. (2d) 774, 775.....	14
Derringer v. A. J. Plate, 29 Cal. 292 (1865).....	14
The Albert Dickinson Company v. Mellos Peanut Company of Illinois, Inc. (C. A. 7, 1950) 179 F. (2d) 265, 269.....	11
Eastern Columbia, Inc. v. Waldman, 30 Cal. (2d) 268, 181 P. (2d) 865, 867 (1947).....	14, 15
Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483, 494 (1922).....	19
F. W. Fitch Co. v. Camille, Inc., 106 F. (2d) 635 (C. C. A. 8, 1939).....	20
Frischer & Co., Inc. et al. v. Bakelite Corporation, et al., 39 F. (2d) 247 (C. C. P. A., 1930).....	20
Grocers Banking Co. v. Sigler, 132 F. (2d) 498 (C. C. A. 6, 1942).....	20
Hoover Co. v. Groger et al., 12 Cal. App. (2d) 417, 55 P. (2d) 529.....	14
Horlick's Malted Milk Corporation v. Horluck's, Inc., 59 F. (2d) 13, 15 (C. C. A. 9, 1932).....	15



S. C. Johnson & Son v. Johnson, 28 F. Supp. 744, 749 affirmed on appeal (C. C. A. 2, 1940) 116 F. (2d) 427, 429.....	25
Lane Bryant, Inc. v. Maternity Lane Limited of California, 173 F. (2d) 559 (C. A. 9, 1949).....	15
LaTouraine Coffee Co., Inc. v. Lorraine Coffee Company, Inc., et al., 157 F. (2d) 115, 118 (C. A. 2, 1946)	13
Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 F. 657, 661 (1902).....	19
My-T Fine Corporation v. Samuels, 69 F. (2d) 76, 77 (C. C. A. 2, 1934).....	21
Oneida, Ltd. v. National Silver Co. (Sp. Ct., 1940), 25 N. Y. S. (2d) 271, 286.....	25
Radio Shack Corporation v. Radio Shack, Inc., 180 F. (2d) 200, 206 (C. A. 7, 1950).....	23
Safeway Stores, Inc. v. Dunnell, 172 F. (2d) 649, 656 (C. A. 9, 1949).....	12
Saratoga Vichy Spring Co. v. Saratoga Carlsbad Corporation et al., 45 F. Supp. 260, 261 (D. C. S. D. N. Y. 1942).....	20
Saxlehner v. Siegel-Cooper Company, 179 U. S. 42 (1900) .....	20
Standard Brands, Inc. v. Smidler, 151 F. (2d) 34, 37 (C. C. A. 2, 1945).....	23
Stork Restaurant v. Sahati, 166 F. (2d) 348 (C. A. 9, 1948) .....	15
Sunbeam Lighting Co. et al. v. Sunbeam Corporation, 183 F. (2d) 969 (C. A. 9, 1950).....	4, 21
Tillman & Bendel v. California Packing Corp. (C. C. A. 9, 1933) 63 F. (2d) 498, 502.....	25
Triangle Publications, Inc. v. Rohrlich et al., 167 F. (2d) 969, 972 (C. C. A. 2, 1948).....	24

Wall v. Rolls-Royce of America, Inc., 4 F. (2d) 333, 334 (C. C. A. 3, 1925).....	23
William R. Warner & Co. v. Eli Lilly & Co., 265 U. S. 526, 529, 530; 44 S. Ct. 615, 617 (C. C. A. 3, 1924) ..	11, 20
Weatherford et ux. v. Eytchison et al., 202 P. (2d) 1040, 90 Cal. (2d) 379 (1949).....	14
Winfield v. Charles, 77 C. A. (2d) 64, 175 P. (2d) 69 (1946) .....	13
Wisconsin Electric Co. v. Dumore Co., 35 F. (2d) 555, 557 (C. C. A. 6, 1929).....	15
Wood v. Pepper, 55 C. A. (2d) 116, 122, 130 P. (2d) 220 (1942).....	14

#### TEXTBOOKS CITED.

American Law Institute Restatement of the Law of Torts, Chapter 35, Section 734.....	17
Vol. III, Section 716, p. 560.....	24
McKelvey, Evidence, 1944, p. 390.....	25
Nims, Unfair Competition and Trade-Marks, 4th Ed., p. 941.....	21
Wigmore, Evidence, Vol. VI, Section 1766, p. 177....	25

#### STATUTES.

Trade Mark Act of 1946, 15 U. S. C. 1051-1127, 1114 (Sec. 32(1)).....	10
(Sec. 32(2)).....	20
United States Trade-Mark Act (Title 15 U. S. C. Sec- tions 1051 through 1127).....	1
United States Trade-mark Act of February 20, 1905, 15 U. S. C. Section 96 (Repealed July 6, 1946)....	11



In the  
**United States Court of Appeals**  
For the Ninth Circuit

---

No. 12,628

---

---

SUNBEAM FURNITURE CORP., a corporation,

ARTHUR M. LUSTER, MELVIN R. LUSTER and FRIEDA LUSTER, individuals doing business as SUNBEAM FURNITURE SALES CO.,

*Appellants,*

*vs.*

SUNBEAM CORPORATION, a corporation,  
*Appellee.*

Appeal from the United States District Court, Southern District of California, Central Division.

---

Honorable  
Leon R. Yankwich,  
Judge Presiding.

---

**BRIEF FOR PLAINTIFF-APPELLEE.**

---

Appellants will hereinafter be referred to as defendants and appellee as plaintiff.

**JURISDICTION.**

---

Plaintiff concurs with defendants' statements as to jurisdiction as they appear at page one of their Opening Brief but cites additionally the United States Trade-Mark Act, (Title 15 U. S. C. Sections 1051 through 1127).

STATEMENT OF THE CASE.

---

**A. The Facts.**

Plaintiff is a well known manufacturer of various household electrical goods ranging from shavers to coffee makers. Since 1921 it has applied to its products its federally registered trade-mark **SUNBEAM** and has sold such household electrical products throughout the United States and in many foreign countries. It has engaged in the manufacture and sale of electrical products since 1912. Through the years since 1921 it has registered its trade-mark **SUNBEAM** in the United States Patent Office for its numerous household electrical products as seen in Exhibits B-1 through B-18 attached to its Amended Complaint (R. 28). In 1946 plaintiff changed its corporate name from Chicago Flexible Shaft Company to Sunbeam Corporation. Actually it had been known by the trade and public as **SUNBEAM** for many years (See Plf's. Ex. 4, R. 107).

The defendants, Sunbeam Furniture Corp., and its Secretary-Treasurer and General Manager, Melvin R. Luster, conduct a wholesale furniture business in Los Angeles, California and neighboring states and communities (R. 205). Part of their business is devoted to the sale of household electric lamps. Defendants claim to have commenced use of **SUNBEAM** sometime in 1942, about twenty-one years subsequent to its adoption by plaintiff. Defendants' business includes, along with lamps, the wholesale distribution of various items of furniture such as sofas, chairs, tables, and dinette sets which they obtain from manufacturers and which they resell to retail outlets.

In 1946, soon after learning of defendants' operations,

plaintiff called upon them to discontinue their use of SUNBEAM. Following their refusal this action was filed, and Expert Lamps Inc., an Illinois corporation operated in Chicago, and Arthur M. Luster, its president and president of defendant Sunbeam Furniture Corp., were included in the parties named. Arthur M. Luster is the father of defendant Melvin R. Luster and the principal owner of both Expert Lamps, Inc. and Sunbeam Furniture Corp. When it appeared that actual service on Expert Lamps, Inc. or Arthur M. Luster could not be obtained in the Southern District of California, an agreed order was entered quashing service of process on these parties, and an amended complaint omitting them as parties defendant was later filed.

After full trial, during which the validity of plaintiff's rights in its registered trade-mark SUNBEAM were not questioned, the District Court, in accordance with its findings of actual confusion (Finding 31, R. 70) and the likelihood of future confusion (Finding 30, R. 70), and the presence of intent to compete unfairly and to infringe, entered judgment for the plaintiff and enjoined defendants' further sale of lamps bearing the trade-mark SUNBEAM and further use of SUNBEAM in connection with their business. Plaintiff waived damages.

### B. The Issues.

The basic issues involved here are:

1. Does defendants' advertising and sale of household electric lamps bearing the trade-mark SUNBEAM result in likelihood of confusion with plaintiff and thus in infringement of plaintiff's federally registered trade-mark SUNBEAM and in unfair competition with plaintiff?

2. Does defendants' use of SUNBEAM in their corporate names or business styles constitute infringement of plaintiff's federally registered trade-mark SUNBEAM and unfair competition with plaintiff?

## SUMMARY OF ARGUMENT.

---

I. Plaintiff proved the necessary elements of infringement and unfair competition.

- a. Plaintiff's proof.
- b. Defendants' proof.

II. Defendants' actions constitute trade-mark infringement and unfair competition.

- a. The statute.
- b. The common law.

III. Middle-men are liable in an action for trade-mark infringement or unfair competition.

IV. The arguments of defendants' brief are unavailing.

- a. Distinction between this action and *Sunbeam Lighting Co. et al. v. Sunbeam Corporation*, 183 F. (2d) 969 (C. A. 9, 1950).
- b. Defendants' other claims and arguments are irrelevant.
- c. Plaintiff's public reaction test evidence is admissible and reliable.

ARGUMENT.

---

Defendants' brief amounts to a prolonged series of minor efforts to exaggerate the claims and distort the facts and law of this action. Its theory seems to be that "little strokes fell great oaks". Yet were any doubts thus engendered, a re-reading of the learned opinion of the trial court dispels them, and an examination of the record ratifies the assurance thus had.

Defendants deal in household lamps which bear the trade-mark SUNBEAM while using SUNBEAM as the identifying portion of their trade-name. The record confirms that these acts induce a false association of defendants' goods and business with plaintiff. The federal statute and the common law justly direct that, where such confusion is even likely, its cause should be enjoined. The decree of the District Court protected plaintiff's individual commercial identity from defendants' forgery. That such action was the only lawful and conscionable course available will be demonstrated below.

## I.

**PLAINTIFF PROVED THE NECESSARY ELEMENTS OF INFRINGEMENT AND UNFAIR COMPETITION.**

As stated by the trial court, there is no real contradiction in the evidence of the parties.<sup>1</sup> The proofs are summarized as follows:

---

1. "The evidence offered on the part of the defendant does not, in reality, contradict the evidence of the plaintiff. All we have is the testimony of the defendant Melvin Luster and one of his salesmen, to the effect that no confusion has ever been called to their attention." (Opinion, R. 59.)

## (a) Plaintiff's Proof.

1. Prior use and registration of SUNBEAM:  
Ploner (R. 101).
2. Extent of plaintiff's use and advertising of SUN-  
BEAM:  
Ploner (R. 104).
3. Secondary meaning of SUNBEAM indicating plain-  
tiff:  
Ploner (R. 105),  
Garriott (R. 171),  
Wallick (R. 179),  
Strandstra (R. 184),  
Wilson (R. 314),  
Brandenburg (R. 330),  
Hampshire (R. 332),  
Fitzhugh (R. 333),  
Rhodes (R. 334),  
Saunders (R. 334),  
Mercer (R. 334),  
Lovin (R. 334),  
Nickelson (R. 334).
4. Nature of defendants' use of SUNBEAM:  
Enfield (R. 336),  
Gibson (R. 325),  
Wilson (R. 315).
5. Results of defendants' use of SUNBEAM—confu-  
sion or passing off:  
Garriott (R. 172),  
Gibson (R. 325-326).
6. Household lamps sold in outlets selling plaintiff's  
products:  
Ploner (R. 112),  
Garriott (R. 170),  
Strandstra (R. 182),  
Wallick (R. 181),  
Wilson (R. 315).



7. Likelihood of confusion—reaction tests demonstrating reaction of consuming public to lamp sold by defendants bearing trade-mark SUNBEAM:

Enfield (R. 335),  
Trotman (R. 362-366),  
Ives (R. 369),  
Algyer (R. 372),  
Lampa (R. 376-383),  
Sahl (R. 389-391),  
Still (R. 393-394).

8. Family relationship of defendants:

Arthur M. Luster deposition (R. 268-290).

Through the testimony of its vice-president, plaintiff proved its nationwide use and enormous advertising of SUNBEAM since 1921 as its trade-mark for its numerous and varied household electrical products. It proved ownership and validity of its eighteen federal registrations of SUNBEAM recited in its Amended Complaint. It proved, by the testimony of members of the public and trade witnesses, its reputation for superior quality merchandise and that its connecting link to the resulting immensely valuable good-will lies in the word SUNBEAM. It similarly proved that SUNBEAM has acquired, long prior to its appropriation by defendants, a secondary meaning signifying, in the household electrical field, plaintiff and plaintiff's products only.

It demonstrated that defendant sells SUNBEAM lamps purchased from the other family-owned corporation; that all of defendants' advertising and promotional material as well as its store front emphasize the word SUNBEAM above all else and consistently treat it as a means for identification (See Plf's. Exhibits 15, 22, 23).

The record also shows that confusion as to the source of a lamp sold by defendants arose from their use of SUN-

BEAM as a trade-mark (R. 172), and that a retail salesman was either himself misled or was encouraged by the use of SUNBEAM to "pass off" the merchandise on plaintiff's reputation (R. 325). It is likewise clear that both plaintiff's and defendants' SUNBEAM products are customarily sold by the same kinds of retail outlets, *i. e.*, furniture and electrical appliance stores.

On the all-important question of likelihood of confusion, plaintiff has not relied on mere speculation and argument, but has offered two scientifically prepared and completely authenticated consumer reaction tests, conducted at an interval of almost two years and demonstrating that confusion of defendants' and their SUNBEAM lamps with plaintiff and its SUNBEAM products is inevitable.

The first test was made during March and April of 1948. A photograph of a SUNBEAM lamp was shown to fifteen-hundred persons in middle income Los Angeles areas. They were asked whether they had ever bought or seen such a lamp and also to name any product or products they might know of that were put out by the same concern. Fifty-one percent, or 766 persons, associated the lamp with Sunbeam Corporation or its products. (R. 376-396.)

The second test was made just before trial and was also conducted in Los Angeles middle income areas. It was similar to the first except that the interviewees were shown a photograph of a SUNBEAM lamp and also an actual specimen of the lamp label bearing the SUNBEAM trade-mark. In this test fifty-six percent of the persons interviewed indicated confusion between the SUNBEAM lamp and the plaintiff or its products.

In offering both tests, all of the original interview sheets were before the court for examination. Sample books of these sheets are in evidence (Plf's. Exhibits 11, 12, 13). With but one exception all personnel who conducted the

tests testified at the trial as to their work, its honesty and accuracy. As an added precaution for accuracy in the second test, the girls hired to take the interviews were not even advised of the purpose of their work or for whom the tests were being made.

The interlocking family relationship between the two defendants Melvin R. Luster and Sunbeam Furniture Corp., and Expert Lamps, Inc., and Arthur M. Luster, the father of Melvin and the president and principal stock holder of both corporations, is best disclosed by examination of the discovery deposition of Arthur M. Luster, taken in Chicago, Illinois, and, at the suggestion of the court, read into the record at the trial (R. 271). The senior Luster stated therein that defendant Sunbeam Furniture Corp. (of which he is president) sold no lamps bearing the trade-mark "Sunbeam" (Rec. 284, 285, 286) nor any goods in a carton with the word SUNBEAM printed thereon (R. 286). Yet the entire record of the trial, including the testimony of his son, demonstrates that the above statements were untrue (R. 247, 316).

**(b) Defendants' Proof.**

1. Nature of defendants' business and use made of Sunbeam:

Luster (R. 205).

2. No knowledge of confusion with plaintiff:

Luster (R. 251),

Ain (R. 263),

Wolfe (R. 199).

Defendants' efforts were almost wholly directed to showing that they are a wholesale concern and that they deal only with the ultimate consumer when customers are referred to their show rooms by their retail accounts. It appeared, however, that the reference of such customers is encouraged and indeed solicited by defendants (R. 362).

Testimony was also offered to show that the preponderance of defendants' business was in non-electrical items of household furnishings, and that no instance of confusion with plaintiff had ever come to the attention of defendant Melvin R. Luster, or two of his salesmen. These three were defendants' only witnesses.

## II.

### **PLAINTIFF'S TRADE-MARK SUNBEAM IS INFRINGED.**

#### **(a) The Statute.**

“Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided, except that under subsection (b) hereof the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers.” (Trade Mark Act of 1946, 15 U. S. C. 1051-1127, 1114 (Sec. 32(1).)

Since there is no question that defendants use SUNBEAM as specified in the Act in connection with the sale and advertising of their goods or services, there only remains the question of likelihood of confusion. That confusion is likely can almost be inferred, since defendants sell such



closely related goods under the same mark while featuring it, moreover, in their corporate name and business style. The question of likelihood of confusion is one of fact, the essence of which is the state of mind of the public at large:

*The Albert Dickinson Company v. Mellos Peanut Company of Illinois, Inc.*, 179 F. (2d) 265, 269 (C. A. 7, 1950).

*Coca-Cola Co. v. Snow Crest Beverages, Inc.*, 162 F. (2d) 280, 283 (C. C. A. 1, 1947).

*William R. Warner & Co. v. Eli Lilly & Co.*, 265 U. S. 526, 529 (1924).

SUNBEAM has become almost universally known to the trade and public as denoting plaintiff in the field of household electrical goods (R. 171, 184, 179). SUNBEAM household electric lamps sold and distributed by SUNBEAM (see Plf's. Ex's. 1, 7, 8 and Def's. Ex. FF) can only mean the plaintiff to most of those who may encounter them.

Even under the language of the repealed Trade Mark Act of 1905,<sup>2</sup> which required that infringing use must involve a confusingly similar mark in connection with goods of "substantially the same descriptive properties", plaintiff would be entitled to the relief granted. Household electric lamps and plaintiff's various household electrical products (recited in the registrations listed in its amended complaint, R. 31-32) are manifestly goods of the same descrip-

---

2. "That the registration of a trade-mark under the provisions of this act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable \* \* \*"

(United States Trade-Mark Act of February 20, 1905, 15 U. S. C. Section 96 (Repealed July 6, 1946).)

tive properties. Direct competition has long since ceased to be a necessary element for unfair competition. Such an argument:

“\* \* \* is an unreal cleavage of the business, especially in this Circuit where the right to a trademark or tradename will be protected even in absence of competition.<sup>39</sup> Moreover, the doctrine does not find approval in other circuits and is condemned by The Restatement of Torts, which states emphatically that protection will be afforded even in the case of non-competitive goods, businesses and services, where, because of prior use, ‘Confusion of source may result.’ ”<sup>40</sup> *Brooks Bros. v. Brooks Clothing of California, Limited*, 60 F. Supp. 442, 459, 460. (Adopted and affirmed, 158 F. (2d) 798 (C. C. A. 9, 1947).

To the same effect is the leading case of *Safeway Stores, Inc. v. Dunnell*, 172 F. (2d) 649 (C. A. 9, 1949), wherein it is stated at page 656:

“Even assuming the absence of any competition of toilet tissues and Dunnell’s covers for protection of toilet users, Stores is entitled to its injunction. The principle is well stated in Judge Learned Hand’s opinion in *Yale Electric Corporation v. Robertson*, 2 Cir., 26 F. 2d 972, at page 974, ‘However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner’s reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower’s use is so foreign to the owner’s as to insure against any identification of the two, it is unlawful.’ ”



The Congress, seeking to preclude the inequities which sometimes arose from the language of the earlier statute, and to afford protection in terms of the business necessities of a national-market economy, as well as according to the dictates of decent commercial ethics, specifically deleted the artificial requirement that the parties' goods must be "of the same descriptive properties" and directed that only a "likelihood of confusion" need exist to support the injunctive relief prescribed. In so doing it merely conformed the language of the new Act to the broadening interpretation found in the better considered opinions of the courts.<sup>3</sup>

The record, summarized above, leaves no doubt that, to a large portion of those who may encounter it, the sale of SUNBEAM lamps by a SUNBEAM company spells plaintiff or plaintiff's products. Thus, likelihood of confusion exists, and under the precise language of the federal statute defendants have infringed.

### (b) The Common Law.

Likewise, under the common law, defendants must be found to have infringed, for here also likelihood of confusion is the test, and the absence of direct competition is no excuse. The leading California case of *Winfield v. Charles*, 77 C. A. (2d) 64, 175 P. (2d) 69 (1946), states that:

"It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the

---

3. In the case of the *LaTouraine Coffee Co., Inc. v. Lorraine Coffee Company, Inc., et al.*, 157 F. (2d) 115 (C. A. 2, 1946), Judge Clark, writing the majority opinion, stated at page 118:

"Be that as it may, Congress has shown its continued interest in trade-mark protection by the comprehensive new codification of trade-mark law embodied in the Trade Mark Act of July 5, 1946, which not merely amplified the Act of 1905, 15 U. S. C. A. Sec. 81, *et seq.*, but gave to this property right a legislative standing it had not had before. Derenberg, *Trade-Marks Ante Portas*, 52 Yale L. J. 829, 830. We should hesitate to go against so clearly expressed a legislative intent for only some remote fears of our own of social disaster to result from grant of the statutory protection. The new statute affords relief for a 'colorable imitation' where use is 'likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods,' Sec. 32 (1) (a), Act of July 5, 1946."

likelihood of deception which the remedy may be invoked to prevent \* \* \* 'It is sufficient if injury to the plaintiff's business is threatened, or imminent, to authorize the court to intervene to prevent its occurrence.' (*Sun Maid Raisin Growers v. Mosesian*, 84 Cal. App. 485, 497).''

Correspondingly, in the case of *Academy of Motion Picture Arts and Sciences v. Benson*, 15 Cal. (2d) 685, 689, 104 P. (2d) 650, 652 (1940), the Supreme Court of California said:

"The decisions of the courts for the most part are concerned with the principles applicable to infringement and unfair competition in respect to businesses which are directly competitive. But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses. In situations involving the use of proper surnames in non-competitive businesses it has been held that *where confusion was shown as likely to result the relief should be accorded to the complaining party.*" (Emphasis ours.)

Among the numerous California cases enunciating the same general rules are the following:

- Wood v. Peffer*, 55 C. A. (2d) 116, 122, 130 P. (2d) 220 (1942);
- Eastern Columbia, Inc. v. Waldman*, 30 Cal. (2d) 268, 181 P. (2d) 865 (1947);
- Weatherford et ux. v. Eytchison et al.*, 202 P. (2d) 1040, 90 Cal. (2d) 379 (1949);
- Hoover Co. v. Groger et al.*, 12 Cal. App. (2d) 417, 55 P. (2d) 529;
- Derringer v. A. J. Plate*, 29 Cal. 292 (1865).

And similarly are the federal cases such as:

- Del Monte Special Food Company v. California Packing Corporation*, 34 F. (2d) 774, 775.

*Stork Restaurant v. Sahati*, 166 F. (2d) 348 (C. A. 9, 1948).

*Lane Bryant, Inc. v. Maternity Lane Limited of California*, 173 F. (2d) 559 (C. A. 9, 1949).

*Brooks Bros. v. Brooks Clothing of California, Limited*, 60 F. Supp. 442, (adopted and affirmed, 158 F. (2d) 798 (1947)).

*Horlick's Malted Milk Corporation v. Horluck's, Inc.*, 59 F. (2d) 13, 15 (C. C. A. 9, 1932).

As to the protection to be accorded uninvended trade marks which have acquired a meritorious distinctiveness or secondary meaning, the law of California was stated by Justice Carter in *Eastern Columbia, Inc. v. Waldman*, 30 Cal. (2d) 268, 181 P. (2d) 865 (1947). At page 867 he said:

“It is asserted by defendant that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a ‘secondary meaning’ as distinguished from a technical trademark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to use them to the exclusion of others would have been acquired. When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to the one who has the prior right.”

That the rule in the federal courts corresponds, is revealed in *Wisconsin Electric Co. v. Dumore Co.*, 35 F. (2d) 555, (C. C. A. 6, 1929). At page 557 Judge Hicks stated:

“Prima facie there is no fraud or misrepresentation in using as a mark upon his goods any word one chooses, even though another dealer in the same line has already adopted it. This is so because, ordinarily, all have equal rights in the use of language, but, if through its long use as applicable to a particular product or business a word has come to have a ‘secondary meaning,’ he who has thus adopted it is entitled to protection.”

Innumerable citations to the same effect concerning both the statute and the common law could be listed but only to illustrate that this court and those of California have long been the vanguard in the maintenance of respectable standards for the protection of individual commercial identity, and that the other jurisdictions have followed closely their lead.

### III.

#### **MIDDLE-MEN OR DISTRIBUTORS ARE LIABLE IN AN ACTION FOR TRADE-MARK INFRINGEMENT.**

From defendants’ brief one would imply that their position as a mere “middle-man” or distributor grants them sanctuary from plaintiff’s claims. But the law is neither crippled by such insulating devices nor does it thus excuse infringement or unfair competition. Their claim actually amounts to no more than a re-phrasing of the oft’ refuted effort to argue that no unfair competition may exist where there is no competition.

Defendants here are in the nature of joint tort feasons in so far as they call themselves SUNBEAM and deal in lamps bearing the trade-mark SUNBEAM. Even if ignoring the interlocking family business relationship or the dealings with retail customers in their show-rooms, they are direct participants in the infringement of plaintiff’s registrations



and in the fraud thus perpetrated upon the trade and public.

The law is well stated in the *American Law Institute Restatement of the Law of Torts*, Chapter 35, Section 734, as follows:

“*Infringement in Different Stages of Distribution.*”

“One infringes another’s trade-mark or trade name, under the rule stated in Sec. 717, whether he uses his designation in the same stage of the process of distribution as that in which the other uses his trade-mark or trade name or in a different stage, and whether he is the initial or a subsequent distributor of the goods or services denominated by the designation.

“*Comment:*

“a. *Same or different stage of marketing process.* The rule stated in this Section is corollary to the rules stated in Secs. 728 and 730. Direct competition between the person having the trade-mark or trade name and the alleged infringer, either with respect to the type of goods which they market or with respect to the stage in the process of distribution which they occupy, is not an essential condition of liability for the infringement of trade-mark or trade name. Just as one who markets only maple syrup may infringe the trade-mark of another who markets only pancake flour, so also may one who sells only to wholesalers infringe the trade-mark of another who sells only to retailers or only to ultimate consumers. The possibilities of harm to the person having the trade-mark or trade name are similar whether the confusion or deception is caused at one step or another in the marketing process. Moreover, marketing processes are constantly changing. One who sells only to retailers today may begin to sell to wholesalers or direct to consumers tomorrow. Or, though continuing to market through the same channels, he may advertise in all channels. The difference in the classes of persons who purchase the goods of the two parties may, however, be a factor on the issues of confusing similarity (Secs. 728 and 729) or the extent of protection with refer-

ence to the kind of goods, services or business (Secs. 730 and 731) or the practicability of limited protection under the rule stated in Sec. 735.

“b. *Initial or subsequent distributors.* A middleman infringes a trade-mark under the same conditions as the manufacturer. It is immaterial that the actor is not the manufacturer, or that the claimed infringing designation was placed upon the goods by some third person. It is sufficient to constitute infringement that the actor markets the goods under the conditions stated in Sec. 717. Compare Sec. 714; Sec. 727, Comment b; and Sec. 728, Comment c.

“Illustration :

“1. A uses the trade-mark ‘ZEREX’. B subsequently manufactures goods, affixes the same designation to them and sells them to C, a wholesaler, who sells them to D a retailer, who sells them to ultimate purchasers. Under the conditions stated in Sec. 717, B, C and D infringe A’s trade-mark.”

The law of California is disclosed in *American Philatelic Society v. Claibourne*, 3 Cal. (2d) 689, 46 P. (2d) 135, a case in which the defendant was, as here, a wholesaler. At page 697, Judge Curtis said :

“So, likewise, it is immaterial to the charge of unfair competition that the respondent made no attempt to deceive the retail dealers and in fact frankly stated to them the true facts, that the stamps were unofficially separated. There is an abundance of cases recognizing and setting forth the well-settled rule that it is of no consequence in a charge of unfair competition that no deception is practiced on the retail dealers and they know exactly what they are getting; that the wrong lies in designedly enabling the dealer to palm off the copy or simulated article as that of the complainant. (*Von Mumm v. Frash*, 56 F. 830, 834; *Warner & Co. v. Lilly & Co.*, 265 U. S. 526; see 84 A. L. R., annotation, pp. 486, 487.)”



In *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 F. 657 (1902), Judge Morrow, speaking for the Circuit Court of the United States for the Northern District of California, stated the same rule as the law of that Circuit. At page 661, he said:

“It may be conceded that the defendant never, by any of its officers or agents, intimated to its salesmen that they should recommend the defendant's packages as being readily disposed of to consumers who asked for and wished to have complainants. But such oral commendation was certainly unnecessary. A survey of the two packages, placed side by side, would sufficiently suggest this possibility to a dishonest dealer. We have, then, the case of a manufacturer who is careful always to sell its goods as its own, but who puts them up in a style of package so similar to that used by one of its competitors, earlier in the market, that unscrupulous dealers, who purchase from the manufacturer in order to sell at retail to consumers, are enabled to delude a large number of such retail purchasers by palming off upon them the goods of the manufacturer as those of its competitor. That this is unfair competition seems apparent, both on reason and authority.”

Mr. Justice Brandeis, speaking for the Supreme Court in *Federal Trade Commission v. Winsted Hosiery Company*, 258 U. S. 483 (1922), stated the following at page 494:

“That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.<sup>1</sup> And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby.<sup>2</sup>

[Footnotes:]

1. *Von Mumm v. Frash*, 56 Fed. 830; *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 722; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 155.

2. *Manhattan Medicine Co. v. Wood*, 180 U. S. 218; *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 538.”

To the same effect is *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U. S. 526, 530, 44 S. Ct. 615, 617 (1924).

In *Saratoga Vichy Spring Co. v. Saratoga Carlsbad Corporation, et al.*, 45 F. Supp. 260 (D. C. S. D. N. Y., 1942), Judge Conger said, at page 261:

“If plaintiff is correct in its contention here as to the charges of infringement and unfair competition, it is no defense, that the defendants are merely sellers or wholesalers or distributors and not the original bottler or manufacturer. *Hansen v. Seigel-Cooper Co., et al.*, C. C., 106 F. 690; *Pro-phy-lac-tic Brush Co. v. Abraham & Straus, Inc.*, D. C. 11 F. Supp. 660.”

Among the many decisions to the same effect are:

*Saxlehner v. Siegel-Cooper Company*, 179 U. S. 42 (1900);

*Frischer & Co., Inc., et al. v. Bakelite Corporation, et al.*, 39 F. (2d) 247 (C. C. P. A., 1930);

*Chesebrough Mfg. Co. v. Old Gold Chemical Co.*, 70 F. (2d) 383 (C. C. A. 6, 1934);

*F. W. Fitch Co. v. Camille, Inc.*, 106 F. (2d) 635 (C. C. A. 8, 1939);

*Grocers Banking Co. v. Sigler*, 132 F. (2d) 498 (C. C. A. 6, 1942).

The clear language of the statute does not except middlemen from liability. By analogy, it is noteworthy that the Act specifically provides for enjoining even innocent infringers such as printers who print labels or advertising matter bearing infringing material.<sup>4</sup> Thus, even under

4. “Notwithstanding any other provision of this Act, the remedies given to the owner of the right infringed shall be limited as follows: (a) Where an infringer is engaged solely in the business of printing the mark for others and establishes that he was an innocent infringer the owner of the right infringed shall be entitled as against such infringer only to an injunction against future printing: \* \* \*

Trade-Mark Act of 1946, Section 32 (2), (15 U. S. C. 1114 (2).)

facts indicating no intent to infringe or compete unfairly, these defendants should be enjoined. In his text, *Unfair Competition and Trade-Marks*, 4th Ed., Mr. Harry Nims states at page 941:

“Deception caused by sale of infringing goods, though directly attributable to the manufacturer or to the seller, may have been possible only through the aid of third persons. Some of the contributors to the damaging result may have acted intentionally—others without deliberate fraud. All share in the responsibility and all may be liable.”

But where defendants are merely an adjunct of a family business, inter-related and interlocking in its operation, ownership and control (opinion below R. 59), and where the intent is obvious, to deny relief would be submission to a sham.<sup>5</sup>

#### IV.

#### THE ARGUMENTS OF DEFENDANTS' BRIEF ARE UNAVAILING.

(a) **Distinction Between This Action and Sunbeam Lighting Co. et al. v. Sunbeam Corporation, 183 F. (2d) 969 (C. A. 9, 1950).**

Defendants seek comfort from the above recent decision of this court involving the same plaintiff and its same trade-mark, SUNBEAM. Although plaintiff respectfully submits

---

5. Although intent to defraud is not a necessary element of trade-mark infringement, Judge Learned Hand has described its effect when present in *My-T Fine Corporation v. Samuels*, 69 F. (2d) 76, (C. C. A. 2, 1934) at page 77:

“We need not say whether that intent is always a necessary element in such causes of suit; probably it originally was in federal courts. (Cit's.) But when it appears, we think that it has an important procedural result; a late comer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile. Prima facie the court will treat his opinion so disclosed as expert and will not assume that it was erroneous. (Cit's.) He may indeed succeed in showing that it was; that, however bad his purpose, it will fail in execution; if he does, he will win. *Kann v. Diamond Steel Co.*, 89 F. 706, 713 (C. C. A. 8). But such an intent raises a presumption that customers will be deceived.”

that the decision therein unduly limited the relief granted in view of the proof of actual confusion, likelihood of confusion and broad secondary meaning; yet respecting portable lamps, the only goods complained of herein, this court found confusion likely and affirmed the judgment below accordingly. It commented at page 971 of its opinion:

“We think the difference between electrical fluorescent lighting fixtures with the method of their marketing, the portable lamps and the way they are marketed puts the latter on sale in such a way as to cause confusion. The injunction should cover this item.”

Moreover, the remainder of the above decision offers no escape for these defendants, since the instant action presents a wholly different array of operative facts. In the earlier case the defendants used SUNBEAM almost exclusively upon large industrial overhead fluorescent lighting installations. Here the goods are SUNBEAM household electric lamps. In the earlier case the greatest portion of the ultimate purchasers were skilled technicians or architects who could be presumed unlikely to be deceived. Here the ultimate purchasers are the public at large. In the prior case, it was claimed that the accused products bore only trade-name, not trade-mark, usage of SUNBEAM and that thus the specialized architect and technician clientele could hardly fail to distinguish. It was only by reliance upon such claims that this Court limited the relief granted below. Here there can be no such argument.

#### **(b) Other Irrelevant Claims and Arguments.**

The defendants' brief is largely emphasis by repetition of various obvious but irrelevant facts. Thus it appears that plaintiff does not make lamps, furniture (p. 14) or numerous other electrical items (p. 17); that plaintiff is not entitled to exclusive rights in the whole electrical, furniture and household equipment fields (p. 13, 36); that “Use of



a non-fanciful mark in a closely related field will not be enjoined *unless use would indicate a common origin*" (p. 12. emphasis ours); that lamps are not sold on the street (p. 29); that furniture, lamps and plaintiff's products are not, in some stores, displayed and sold in the same department (p. 15, 36); that lamps are but a part of defendants' business (p. 22); that a large part of defendants' business is wholesaling (p. 23, 36); and that the three witnesses defendant presented had not been confused and knew of no confusion (p. 26).

Yet it remains clear that the ultimate outlets for furniture, lamps, and plaintiff's products, are frequently the same; thus confusion is likely when the same mark is used on similar goods.

Although no one would confuse an electric lamp with an electric iron, or with any of plaintiff's other products, the test is not confusion of goods, but confusion of source. In *Wall v. Rolls-Royce of America, Inc.*, 4 F. (2d) 333 (C. C. A. 3, 1925), Judge Buffington said, at page 334:

"It is true those companies made automobiles and aeroplanes, and Wall sold radio tubes, and no one could think, when he bought a radio tube, he was buying an automobile or an aeroplane. But that is not the test and gist of this case."

See also *Standard Brands, Inc. v. Smidler*, 151 F. (2d) 34, 37 (C. C. A. 2, 1945); *Radio Shack Corporation v. Radio Shack, Inc.*, 180 F. (2d) 200, 206 (C. A. 7, 1950).

Plaintiff claims a right to relief against certain of defendants' acts respecting certain of its goods, and no more. The common law and the statute provide for such relief, despite minor differences in goods, or that these goods are but a part of defendants' business. The question is not whether some of defendants' acts do not lead to confusion, but whether some do. It is only against the latter that plaintiff has sought relief.

Defendants argue that they are entitled to use "SUN-BEAM" because it is "descriptive" of their goods; yet they never use it in its ordinary language or descriptive signification (to which plaintiff could not object). They use it, instead, solely in its identifying significance as a trade-mark and trade name.

As to trade-mark usages by third parties, it may be that SUNBEAM is used by some others on wholly dissimilar products; but, as defendants have admitted at page 12 of their brief concerning "weak" marks, "Use of a non-fanciful mark in a closely related field will not be enjoined *unless use would indicate a common origin*" (emphasis ours). Just as the defendants argue, likelihood of confusion, or an indication of "common origin," can exist even as to the "narrowest" of marks. In so much as a once "narrow" mark has acquired broad secondary meaning, that much enhanced is the likelihood of confusion which perhaps would otherwise be remote or narrowly confined due to the nature of the mark. It is a question of fact to be decided subjectively rather than objectively in each case. Plaintiff has demonstrated sufficient breadth of secondary meaning and likelihood of confusion here to overcome any claim of "narrowness."

As summarized in *Triangle Publications, Inc. v. Rohrllich et al.*, 167 F. (2d) 969, 972 (C. C. A. 2, 1948):

"It is settled law that a plaintiff who has established a right to a trade name which is fanciful or arbitrary or has acquired a secondary meaning is entitled to protection of his reputation against the use of that name by others even upon non-competing goods, if the defendant's goods are likely to be thought to originate with the plaintiff."<sup>6</sup>

---

6. "The issue in each case is whether or not in fact a substantial number of present or prospective purchasers understand the designation, when used in connection with goods, services or a business, not in its primary lexicographical sense, but as referring to a particular person or association." *Restatement of the Law of Torts*, Vol. III, Sec. 716, p. 560.



**(c) Plaintiff's Public Reaction Test Evidence Is Admissible and Reliable.**

Plaintiff has offered two scientifically prepared and fully authenticated consumer reaction tests demonstrating that confusion of defendants' SUNBEAM lamps with plaintiff and its products is inevitable. The facts establishing the reliability of the tests and their results have been discussed above. As stated by Wigmore ("Evidence," Vol. VI, sec. 1766, p. 177) and McKelvey ("Evidence," 1944, p. 390) and others, the answers to plaintiff's interview interrogations are not objectionable as hearsay. They are offered merely to indicate the state of mind of those interviewed. Among the decisions confirming their admissibility are: *S. C. Johnson & Son v. Johnson*, 28 F. Supp. 744, 749, affirmed on appeal (C. C. A. 2, 1940), 116 F. (2d) 427, 429; *Tillman & Bendel v. California Packing Corp.* (C. C. A. 9, 1933), 63 F. (2d) 498, 502; *Oneida, Ltd. v. National Silver Co.* (Sp. Ct., 1940), 25 N. Y. S. (2d) 271, 286. Defendants argue that the tests were made by door to door canvasses and by interviewing persons on the street where lamps are not sold. They also protest that a photograph of the defendants' lamp was used. In brief, they object that the reaction tests were tests and not actual sales of lamps. Plaintiff offered its tests as such, however, and believes it has demonstrated that they are of substantial probative and pragmatic significance. It submits that a more reliable presentation of the facts in issue here could not possibly be devised.

### Conclusion.

Plaintiff's registrations of its trade-mark SUNBEAM are admittedly valid. SUNBEAM in the household electrical field has meant plaintiff since long prior to defendants' appropriation. That the sale by a SUNBEAM concern of SUNBEAM household electric lamps results in a likelihood of confusion and is a forgery inferring and implying an association with plaintiff is both proved and obvious. Defendants cannot avoid the powers of a court of equity, and thus the consequences of their acts, through their position as a middleman in an interlocking family business. Thus the judgment below was in accord with the federal statute and the law of this jurisdiction which protect both the public and plaintiff from the fraud and deception inherent in defendants' acts. Plaintiff asks that the judgment be affirmed.

Respectfully submitted,

ROGERS AND WOODSON,  
 WILLIAM T. WOODSON,  
 BEVERLY W. PATTISHALL,  
 LEWIS S. GARNER,  
*Attorneys for Plaintiff-  
 Appellee.*

JOHN F. McCANNA,  
 LYON AND LYON,  
 REGINALD E. CAUGHEY,  
*Of Counsel.*